



Board of Adjustment Case Report

City of Raleigh
Department of City Planning
One Exchange Plaza
Raleigh, NC 27601
(919) 996-2626
www.raleighnc.gov

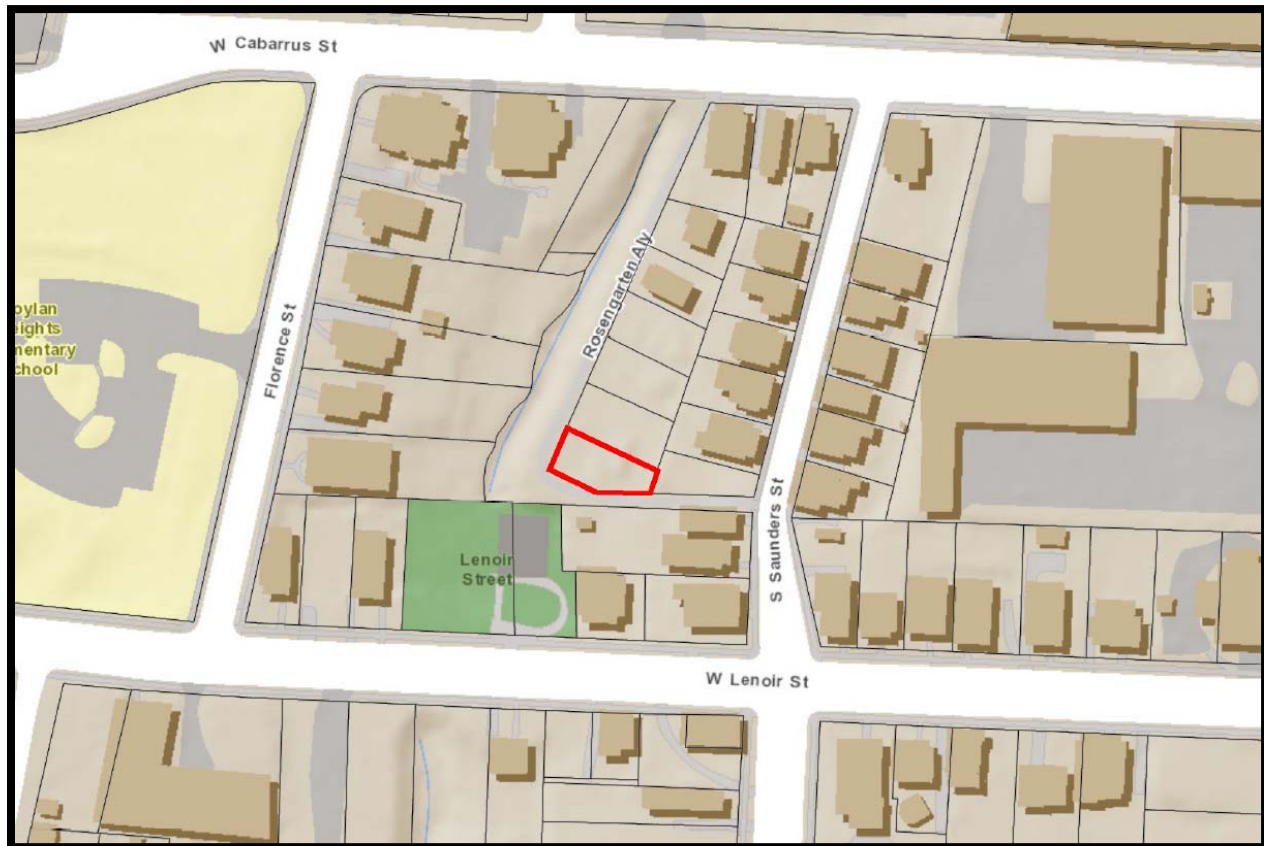
Case File: A-21-17

Property Address: 513 Rosengarten Alley

Property Owner: Megan and Paul Tuorto

Project Contact: Megan Tuorto

Nature of Case: A request for a 14' rear yard setback variance pursuant to Section 2.2.1 of the Unified Development Ordinance to expand the existing detached house into the rear yard resulting in a 6' rear yard setback on a .07 acre property zoned Residential Mixed-Use (RX-3) and located at 507 Rosengarten Alley

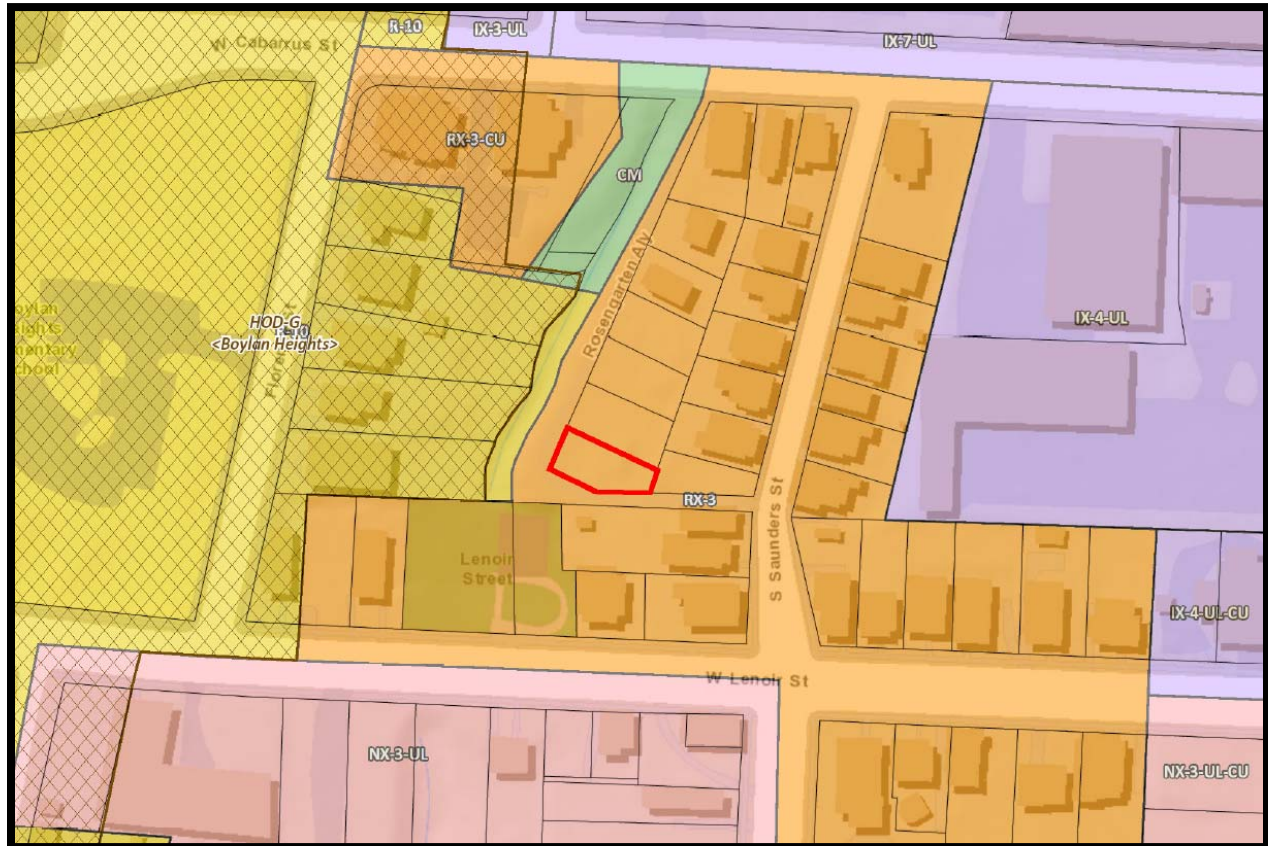


513 Rosengarten Alley – Location Map

To BOA: 2-13-17

Staff Coordinator: Eric S. Hodge, AICP

ZONING DISTRICTS: Residential Mixed Use-3



513 Rosengarten Alley – Zoning Map

VARIANCE STANDARDS: In accordance with UDO [§10.2.10 Variance](#), before a variance request is granted, the Board of Adjustment shall show all of the following:

1. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.

3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose and intent of the ordinance, such that public safety is secured and substantial justice is achieved.

Zoning District Standards: The subject property is zoned Residential Mixed Use-3

Lot Dimensions

Area (min)	4,000 SF
Width – interior lot (min)	45'

<u>Yard Type</u>	<u>Minimum Setback</u>
Primary Street	10'
Side Street	10'
Side	5'
Sum of Sides	10'
Rear	20'

Application for Variance

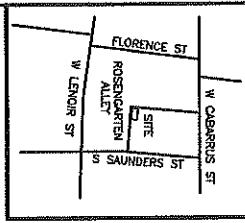


Department of City Planning | 1 Exchange Plaza, Suite 300 | Raleigh, NC 27601 | 919-996-2626

Submit application to: Development Services Customer Service Center, 1 Exchange Plaza, Suite 400, Raleigh, NC 27601

NATURE OF REQUEST	OFFICE USE ONLY
<p>Nature of variance request (if more space is needed, submit addendum on separate sheet):</p> <p>Due to the nonconforming shape and size of our lot, we are proposing a 1.93' side yard setback variance to allow conversion of our existing deck into an enclosed room. We affirm the proposed structure will be built on the same footprint as the existing structure and will not extend any further.</p>	<p>Transaction Number</p> <p>A-21-17</p>
<p>Provide all previous transaction numbers for Coordinated Team Reviews, Due Diligence Sessions, or Pre-Submittal Conferences. If this property was the subject of a previous variance request, provide the case number.</p>	
<p>Previous approved variance case number: A-75-13 (see page 17 of 09/09/2013 meeting minutes)</p>	

GENERAL INFORMATION		
Property Address 513 Rosengarten Alley, Raleigh NC 27603		Date 04Jan2017
Property PIN 1703462770	Current Zoning Residential-20 zoning district	
Nearest Intersection S. Saunders Street and Lenoir Street		Property size (in acres) 0.06
Property Owner Megan M. Tuorto and Paul J. Tuorto	Phone 919-609-0333	Fax
Owner's Mailing Address 513 Rosengarten Alley, Raleigh NC 27603	Email ferrara.megan@gmail.com	
Project Contact Person Megan Tuorto	Phone 919-609-0333	Fax
Contact Person's Mailing Address 513 Rosengarten Alley, Raleigh NC 27603	Email ferrara.megan@gmail.com	
Property Owner Signature <i>Megan Tuorto</i>	Email	
Notary <i>[Signature]</i>	Notary Signature and Seal	
<p>Sworn and subscribed before me this <u>5th</u> day of <u>January</u>, 20 <u>17</u></p>		
<p><i>[Notary Seal: TONYA L MARTIN, NOTARY, MY COMMISSION EXPIRES 3/29/2017, PUBLIC, WAKE COUNTY, NC]</i></p> <p><i>Tonya L. Martin</i></p>		

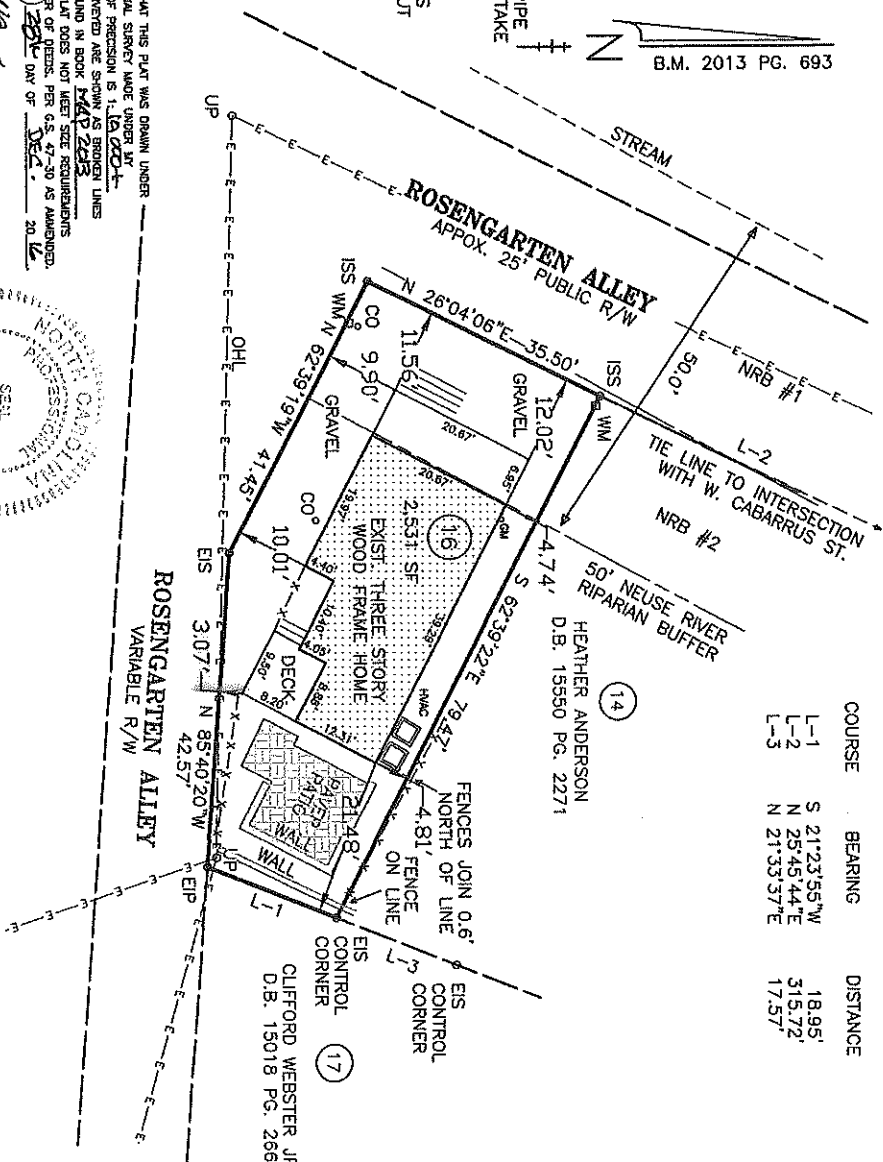


VICINITY MAP NTS

LEGEND

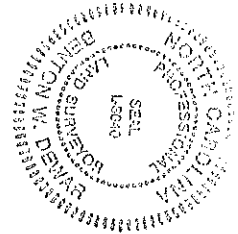
- EIP - EXISTING IRON PIPE
- EIS - EXISTING IRON STAKE
- ISS - IRON STAKE SET
- WM - WATER METER
- UP - UTILITY POLE
- OHL - OVERHEAD LINES
- CO - SINKER CLEAN OUT
- GM - GAS METER
- HVAC - HEAT/AIR UNIT
- SF - SQUARE FEET

B.M. 2013 PG. 693



COURSE	BEARING	DISTANCE
L-1	S 21°23'55"W	18.95'
L-2	N 25°45'44"E	315.72'
L-3	N 21°33'37"E	17.57'

I, BENTON W. DEWAR CERTIFY THAT THIS PLAT WAS DRAWN UNDER MY SUPERVISION FROM AN ACTUAL SURVEY MADE UNDER MY SUPERVISION. THAT THE RATIO OF PRECISION IS 1:16,000. THAT THE BOUNDARIES NOT SURVEYED ARE SHOWN AS DOTTED LINES PLOTTED FROM INFORMATION FOUND IN BOOK 16, PAGE 693 DEED BOOK 15750 PAGE 1302 PIN #1703462770 RALEIGH TOWNSHIP WAKE COUNTY - NORTH CAROLINA SCALE: 1" = 20' DECEMBER 28, 2016



NOTES

AREA BY COORDINATES
NO NCSS CONTROL FOUND WITHIN 2000'
PROPERTY SUBJECT TO BOTH ABOVE AND/OR
BELOW GROUND UTILITIES AND/OR
EASEMENTS.

THIS LOT IS NOT LOCATED IN A
FLOOD HAZARD AREA PER
F.E.M.A. MAP #5720170300J
EFF. DATE: 5/2/2006 ZONE X

VARIANCE SETBACKS

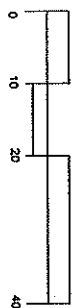
FRONT PORCH - 10'
SIDE - 5'
REAR - 20'
CORNER SIDE - 10'

PHYSICAL SURVEY FOR:

MEGAN & PAUL TUORTO

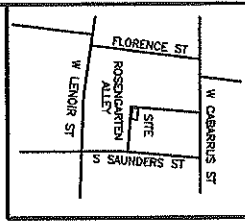
513 ROSENGARTEN ALLEY
RALEIGH, NC 27603

LOT 16 CENTERPLOT/STAROCRAFT
BUILDERS PROPERTY
BOOK OF MAPS 2013 PAGE 693
DEED BOOK 15750 PAGE 1302
PIN #1703462770
RALEIGH TOWNSHIP
WAKE COUNTY - NORTH CAROLINA
SCALE: 1" = 20' DECEMBER 28, 2016



BENTON DEWAR & ASSOCIATES
PROFESSIONAL LAND SURVEYOR
5920 HONEYCUTT ROAD
HOLLY SPRINGS, NC 27540
(919)-552-9813

16-3625
ROSENG/16/650

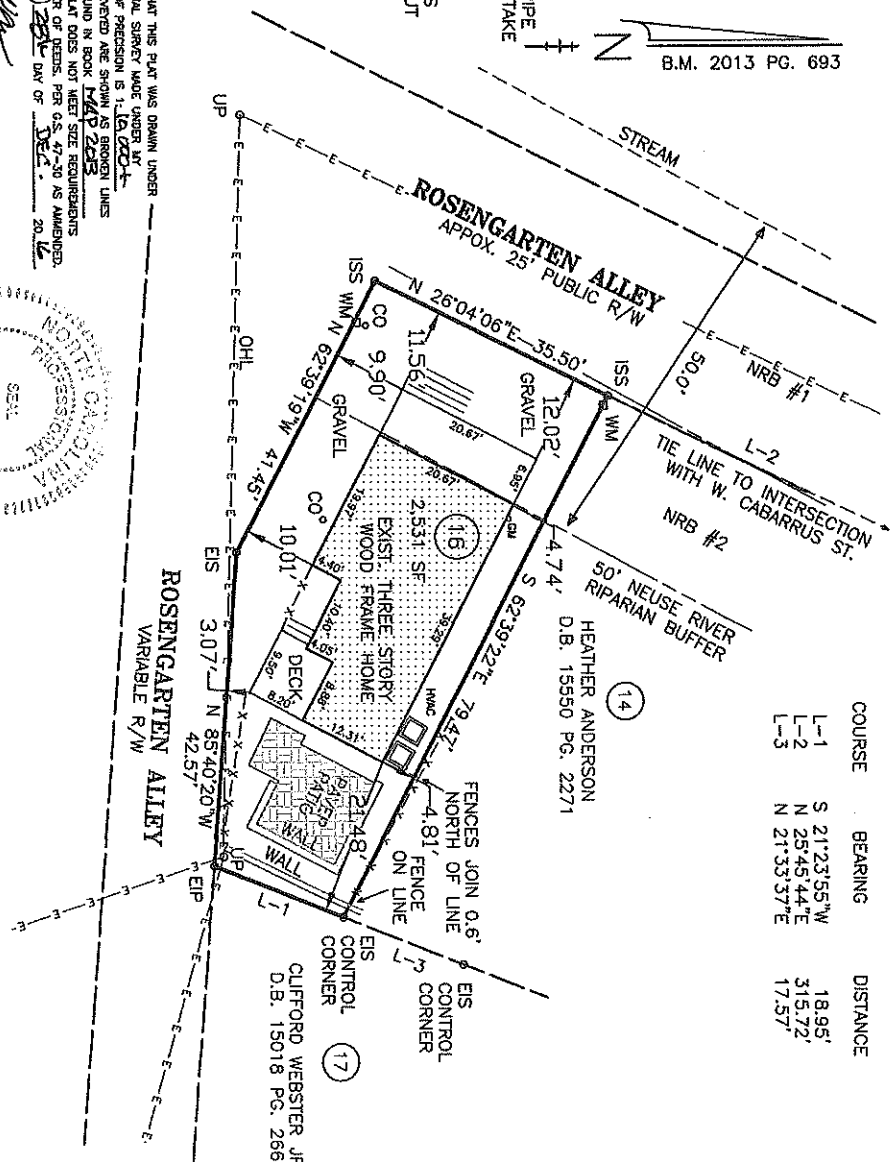


VICINITY MAP NTS

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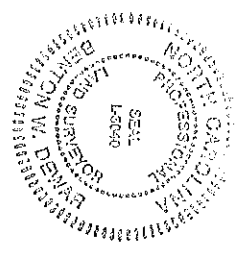
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B.M. 2013 PG. 693



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I, BENTON W. DEWAR CERTIFY THAT THIS PLAN WAS DRAWN UNDER MY SUPERVISION FROM AN ACTUAL SURVEY MADE UNDER MY PERSONAL SUPERVISION, THAT THE BASIS OF PRECISION IS 1/4\"=100'-0\" THAT THE BOUNDARIES NOT SURVEYED ARE SHOWN AS DEDUCTIONS FROM INFORMATION FOUND IN BOOK 1703 PAGE 693 FOR RECORDING IN THE REGISTER OF DEEDS FOR 63, 47-20 AS AMENDED. LICENSE NUMBER AND SEAL THIS 28th DAY OF DECEMBER, 2016



NOTES

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NO NCOS CONTROL FOUND WITHIN 2000'
PROPERTY SUBJECT TO BOTH ABOVE AND/OR
BELOW GROUND UTILITIES AND/OR
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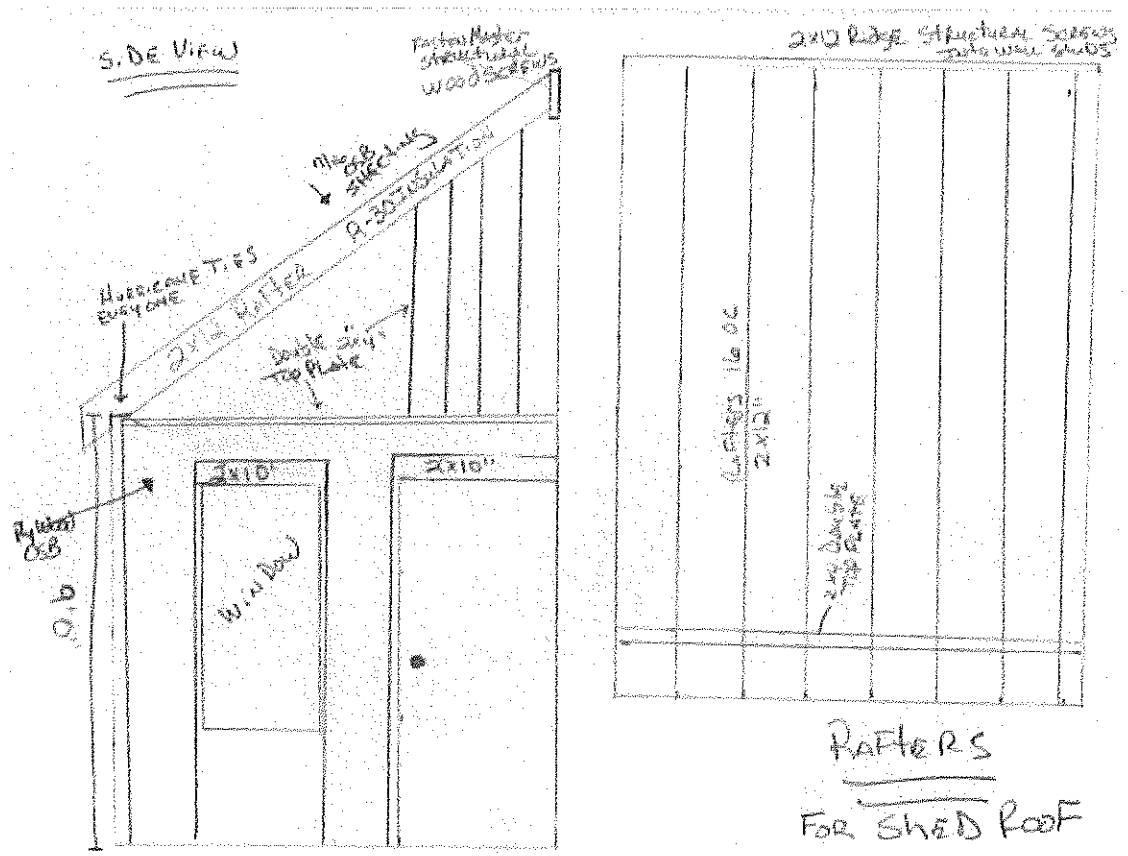
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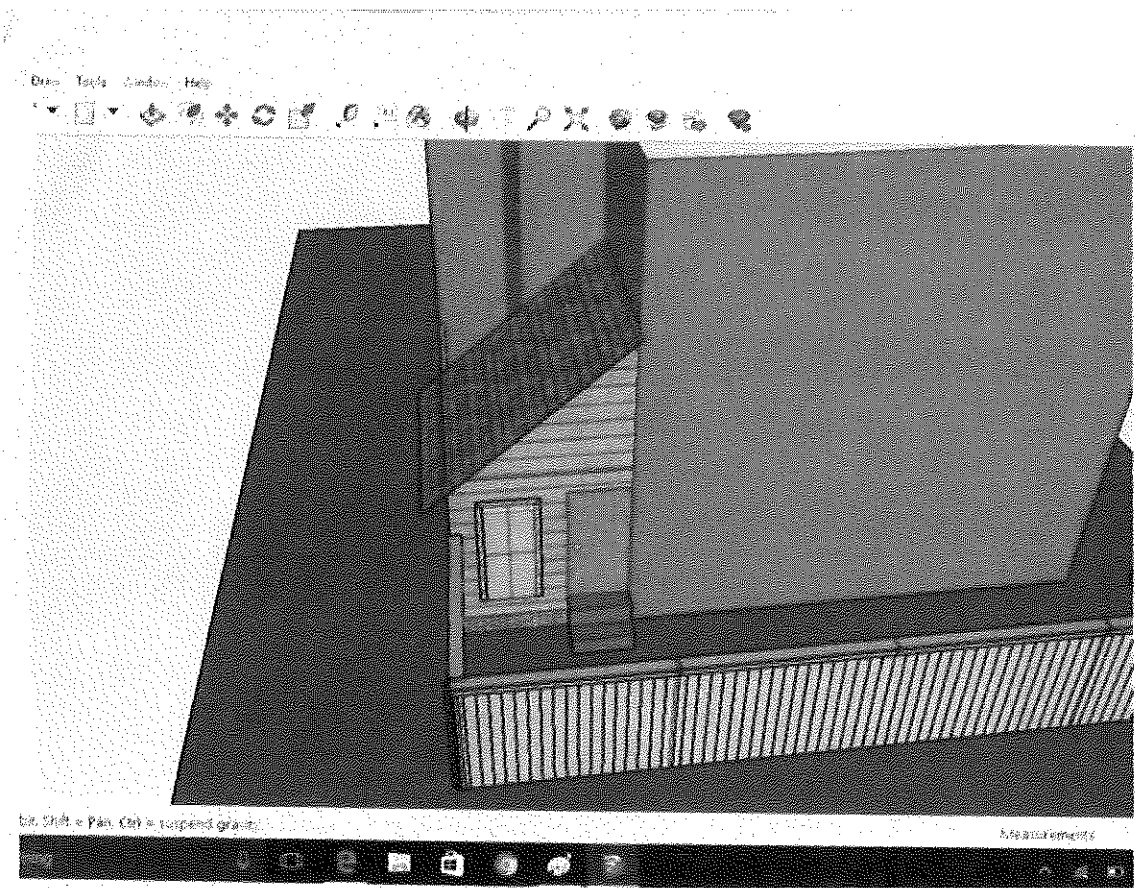
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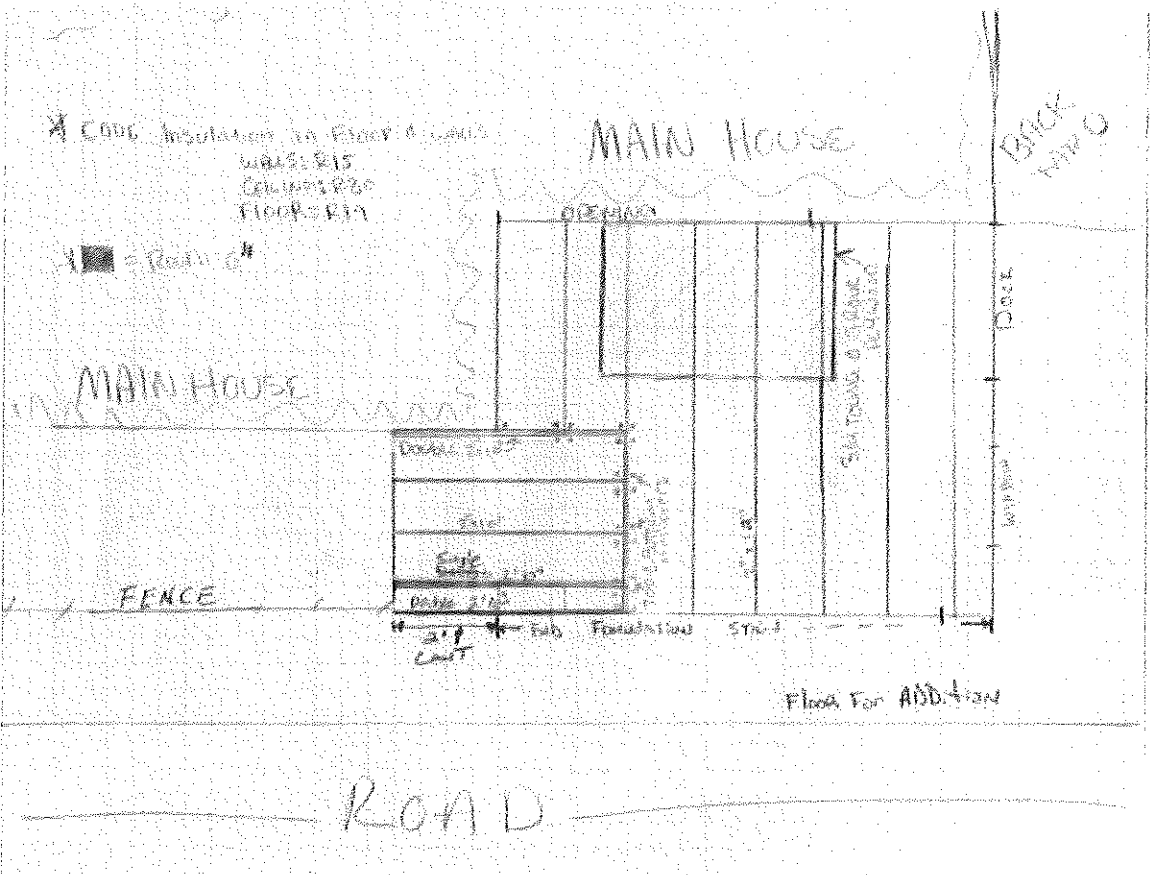
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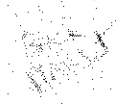
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16-3625
ROSENG/16/650











RALEIGH BOARD OF ADJUSTMENT MINUTES

The Raleigh Board of Adjustment met in regular session on Monday, September 9, 2013 at 1:00 p.m. in the City Council Chamber, Room 201 of the Raleigh Municipal Building, Avery C. Upchurch Government Complex, 222 W. Hargett Street, Raleigh, North Carolina with the following present:

Board

Charles Coble, Chairman, (City)
J. Carr McLamb, Jr., Vice-Chairman (City)
Tommy Jeffreys, Secretary (County)
Timothy Figgins (City)
Karen Kemeraite (City Alternate)
Ted Shear (City)
Brian Williams (City Alternate)

Staff

John Silverstein, Attorney to the Board
Walt Fulcher, Zoning Enforcement
Administrator
Ralph Puccini, Assistant Deputy Clerk

These are summary minutes unless otherwise indicated:

Chairman Coble called the meeting to order and introduced members of the Board and staff present at today's meeting and read the rules of procedure.

Chairman Coble swore in Zoning Enforcement Administrator Walt Fulcher, who used a PowerPoint presentation in aid to presenting testimony.

The following items were discussed with actions taken as shown:

A-76-13 – 09/09/13

DECISION: Deferred to the Board's October 14, 2013 meeting.

WHEREAS, Historic Glenwood Brooklyn Neighborhood Association, a historic neighborhood association, appeals for an Interpretation of the Zoning Ordinance and/or Appeal from an Action of the Zoning Enforcement Officer with regard to signs with changing copy located within the property known as 700 Glenwood Avenue.

The Association asserts the signs are not permitted in the Pedestrian Business Overlay district and the Peace Streetscape Plan.

The subject property's owner is Dee Four LLC and CityGate Real Estate Services, LLC, and is located in the Neighborhood Business district with Pedestrian Business Overlay.

Rachel Kincaid, 819 Clay Street (sworn).

Chairman Coble indicated the City Clerk's Office received an email stating that the matter be deferred. He stated he understood that additional information had come to light regarding the request for deferral with Ms. Kincaid responding she had just gone into labor earlier in the morning.

Attorney Isabel Mattox expressed her objection in that the application is unclear as to who the applicants are, whether it is the association or Ms. Kincaid with Ms. Kincaid stating it is her belief that the Association has standing in this case and that any officer can speak on its behalf and that she is the president of the association. Chairman Coble stated that according to the rules, homeowners associations must have an attorney representing them in quasi-judicial procedures.

Chairman Coble expressed his preference to defer the matter to the Board's October meeting with Ms. Mattox expressing her objection asserting the appeal was filed outside of the time frame, that the association does not have an attorney representing them, and it is her belief that the matter had already been resolved.

Chairman Coble stated without objection from the Board he will defer the matter to the Board's October 14, meeting and advised the applicant to seek legal counsel for the hearing.

A-56-12 – 09/09/13

DECISION: No permit was ever issued, and no one appeared on behalf of Applicant; therefore, the Application is considered withdrawn pursuant to Board rules V.D.3 and V.C.5.

WHEREAS, a review of a Special Use Permit issued by the Board per Code Section 10-2144 at its September 10, 2012 meeting to Eileen F. Schwartz, property owner, James Jones, lessee, and Ziad M. Asfari, sublessee, to operate a storage yard for towed, wrecked, or disabled vehicles in the Industrial-2 zoning district at 1524 Brookside Drive with the following conditions:

1. Special Use Permit limited to the sublessee, Ziad M. Asfari;
2. Hours of operation for the storage yard 9:00 a.m. to 5:00 p.m. Monday through Friday;
3. Sublessee cannot participate in any towing rotation operated by the City of Raleigh or any law enforcement agency;
4. No stacking of vehicles
5. A 12 foot high opaque fence is installed around the storage area; and
6. A review of the Special Use Permit after 1 year to take place at the Board's September 9, 2013 meeting.

Zoning Enforcement Administrator Walt Fulcher (sworn) stated the applicant has not met the conditions of the approval nor has the applicant filed for any permits.

Mr. Silverstein stated that, under the Board's rules, since no permits had been applied for, the matter may be classified as withdrawn.

Applicant

No one was present at the meeting to represent the applicant.

Chairman Coble stated without objection the case is withdrawn.

A-70-13 – 09/13/13

DECISION: Approved the variance as requested

WHEREAS, Mark W. Albrecht, property owner, appeals for a 5.1 foot variance in the street side yard setback requirements per Code Section 10-2075 to legalize the existing dwelling and build an addition in the Residential-4 zoning district at 2400 Lake Wheeler Road.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony:

The applicant is requesting a 5.1 foot variance in the 20 foot corner lot side yard setback to legalize the existing dwelling in the Residential-4 zoning district.

The property owner is making this request in order to place a 200 square foot addition to the rear of the structure. The addition will be 15 feet from the property line but no closer than the existing dwelling. Based on the curvature of the road and the location of the addition in line with the primary structure, staff is not opposed to this request.

Applicant

Mark Albrecht, 2400 Lake Wheeler Road, (sworn) stated he wanted to add a second bathroom and laundry to his home. In response to questions, Mr. Albrecht stated the home was built in the 1920s by the previous owner and that the previous owner has installed the adjacent street in the 1960s. He pointed out the street's right-of-way curves in towards his home; however, the road itself is not centered on the right-of-way.

Discussion took place regarding the location of the nearest neighbor's dwelling and the adjacent church parking lot with Mr. Albrecht pointing out his home's previous owner is owned also lived in the adjacent dwelling.

Opposition

None

Findings of Fact

1. Applicant seeks a variance from Raleigh City Code Section 10-2075 to legalize the existing dwelling in order to add an addition.
2. The Board has considered Applicant's verified application and the evidence and testimony adduced at the hearing.
3. In order to comply with Raleigh City Code Section 10-2075, Applicant would have to provide a 20' corner side yard setback.
4. Applicant is unable to comply with Raleigh City Code Section 10-2075 because the existing dwelling is 14.9' from the corner side line.
5. Subsequent to the erection of the dwelling, a road was installed, the right of way of which is 14.9' from Applicant's structure.
6. The dwelling was built in the 1920's, and the street was installed in the 1960's.
7. The proposed addition will not extend any further into the corner side yard setback than the existing dwelling.
8. Strict compliance with the provisions of the ordinance would deprive Applicant from the reasonable use of the property.
9. Applicant's hardship is related to the unique circumstances of the property, namely that fact that the road creating the setback encroachment was installed after the house was built.
10. The Applicant's actions did not create the hardship or the practical difficulties.
11. The character of surrounding properties would not be adversely affected by the granting of the variance.
12. Denial of the variance would result in insignificant public benefit but would greatly harm Applicant.
13. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.

Conclusions of Law

1. There are practical difficulties or unnecessary hardships in complying with the strict letter of the ordinance.
2. The variance is in accordance with the general purpose and intent of the ordinance and preserves its spirit.
3. The granting of the variance secures the public safety and welfare and does substantial justice.
4. This decision is subject to review for fraud, material misrepresentation, or other misconduct at the proceeding or for violations on the subject property of either any provision of Chapter 10 of the Raleigh City Code or an imposed limiting condition, and if such a determination is made by the Board, its prior decision may be reversed, modified, or affirmed.

Motion

Chairman Coble moved to approve the variance as requested. His motion was seconded by Mr. McLamb and received the following vote: Ayes – 5 (Coble, McLamb, Jeffreys, Figgins, Shear); Noes – none. Chairman Coble ruled the motion adopted and the variance granted.

A-71-13 – 09/13/13

DECISION: Denied

WHEREAS; Ship of Zion Church & Outreach Ministry, Inc., property owner, appeals for a variance from Code Section 10-2081(a) which requires 1 parking space for every eight (8) seats in the principal assembly room for church use to allow a 23 space reduction from the required on-site 25 spaces to install 2 parking spaces in the Residential-20 zoning district at 924 South Blount Street.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony:

The property owner is requesting a variance from Raleigh City Code Section 10-2081 which requires 1 parking space per every 8 seats in the principal assembly area in the Residential-20 zoning district. The applicant is proposing to demolish the existing building and to rebuild a 4,400 square foot church with seating for 200.

There would be 25 required off street parking spaces and 2 are being shown on site. The existing church will seat 100 people with no existing parking on site. There is limited on street parking available and the additional demand would spill over into the residential neighborhoods. They have stated they have 10 parking spaces available on an adjacent lot. However, the lot is zoned Residential-20 and would require a Special use permit approved by the City council to be used for off-site parking.

Based on the impacts of the variance to on street parking and the volume of additional traffic based on doubling the size of the church, staff is opposed to this request.

Chairman Coble questioned whether the building's current use as a church was conforming with Mr. Fulcher responding the Church does not conform as it does not meet the city's current parking lot standards. Mr. Silverstein pointed out the building is used as a church and is permitted in the residential zoning district, so the only issue is the amount of parking available. Mr. Fulcher stated if a residence is converted to a church it would be considered a change of use and therefore the church must comply with the City's parking regulations and that staff considers the subject property nonconforming due to the parking issue.

Chairman Coble questioned if the Special Use Permit were not approved would staff investigate whether the church should be allowed to continue in its current location with Mr. Fulcher responding that would be correct.

Brief discussion took place regarding the number of handicapped spaces required.

Applicant

Reverend Jacqueline Jones, 924 South Blount Street (affirmed) stated her church inherited the site as a church building. She stated the current church has been at this location for 13 years and that the majority of the parishioners walk to church. She pointed out on-street parking is available but reiterated most of her parishioners walk. She stated a proposed redevelopment will have two handicapped spaces on site and there are plans to install a bike rack.

Chairman Coble questioned the property's previous use with Rev. Jones responding the property was used as a church. Chairman Coble questioned how long the property had been used as a church with Rev. Jones responding she did not know.

Discussion took place regarding the number of church services throughout the week and the number of people in attendance with Rev. Jones stating her church averages between 60 and 70 attendees on Sunday morning and about 15 on Sunday afternoon. She stated a Wednesday Bible Study has approximately 35 to 40 attendees including children.

Discussion took place regarding the number of staff at the church and the number of people that attend the church's Friday outreaches with Rev. Jones responding approximately 30 to 40 people are served at the church's outreach, however most of those folks walked to the church site. Chairman Coble questioned the percentage of people served who walked to the church site with Rev. Jones responding approximately 25% of the people served walk.

Discussion took place regarding the construction plans with Rev. Jones expressing it is her hope to expand her church's outreach into the community.

Brief discussion took place regarding the seating capacity of the present church facility and the proposed facility.

Chairman Coble questioned whether the church received any complaints regarding parking with Rev. Jones responding she is not aware of any complaints received.

Chairman Coble pointed out off-site parking would require a special use permit from the City Council with Rev. Jones responding that the church rents the apartments on the subject lots the church proposes to use for parking.

Mr. Shear questioned the leases that were included in the application packet with Rev. Jones stating the leases are for the apartments the church rents.

Chairman Coble questioned whether the vacant lot proposed for additional church parking would require a special use permit with Mr. Fulcher responding in the affirmative adding the special use permit is granted by the City Council.

Approximately 14 people stood in support of the request.

Chairman Coble questioned whether the church has looked at other properties with more space for off-site parking with Rev. Jones responding by pointing out other churches in the area were granted similar parking variances, most notably a church located on nearby Lee Street. Mr. Fulcher confirmed the Board did grant a reduction for a church on Lee Street, however any additional reductions granted would affect traffic and on-street parking issues.

Reverend Chris Jones, 924 South Blount Street (affirmed) stated he and his wife are co-pastors. He stated the reason his church chose this location is it is his belief the church has been effective in the community. He stated the church has been cited and recognized by several organizations for its effectiveness in helping to clean up the neighborhood. He expressed his desire for his church to go with the City's plans for the neighborhood and stated the church is trying to work with most of the people who walk to church. He stated the neighborhood was riddled with crime before the church was established at this location.

Alternative off-site locations for parking were discussed with Rev. Chris Jones stating the church purchased the dwelling adjacent to the church and may use part of that lot for parking. In response to questions, he stated the church currently owns a lot at 1103 South Blount Street, which is at the corner of Blount and Lee.

Opposition

Chairman Coble indicated the Board received a letter in opposition from Gloria Hendrickson, who owns the property located at 930 South Blount Street, the body of which reads as follows:

I, Gloria Hendrickson, property owner at 930 South Blount Street, Raleigh N.C. 27601, am opposing the appeal for a variance from Ship of Zion Church & Outreach Ministry, located at 924 South Blount Street.

I am opposing this application for the following reasons:

- There is another church, Macedonia Apostolic Church, located at 1111 South Blount Street that has services on Sundays as well. During this time, there is limited parking and church members park on the street and on many occasions have blocked the front and back entrance to my property, which prevents me from entering and exiting.
- Ship of Zion Church and Outreach Ministry, Inc. gives out food to the community every second Saturday of each month. I have had problems with people parking and blocking the front and back entrances to my property

during this time as well. Also, the church leaves garbage on the street, which is a big mess to clean up. I have tried to resolve this problem with the pastor of the church and this has not improved.

I fear that this will become a parking nightmare for me and other residents if this application is approved to reduce the required parking space for Ship of Zion Church and Outreach Ministry.

Rebuttal

Jacqueline Jones stated Ms. Hendrickson's property is located next door to the church; however, the property has been vacant for several years and is boarded and fenced in. She stated there is no entrance nearby as the driveway has been fenced. In response to questions, Rev. Jones stated the Church outreach takes place on the second Friday of each month and talked about the amount of cars involved in the outreach; however, neither she nor her husband have received any complaints from Ms. Hendrickson regarding the parking.

Findings of Fact

1. Applicant seeks a variance from Raleigh City Code Section 10-2081(a) for a parking space reduction for its church it plans to rebuild.
2. The Board has considered Applicant's verified application and the evidence and testimony adduced at the hearing.
3. In order to comply with Raleigh City Code Section 10-2081(a), Applicant would have to provide one parking space for every 8 seats in the principal assembly room.
4. Applicant is unable to comply with Raleigh City Code Section 10-2081(a) because Applicant can provide only 2 spaces on site.
5. Applicant proposes to demolish its existing building, and erect a structure that would seat 200 people in the principal assembly room.
6. The Raleigh City Code would require Applicant to provide 25 spaces on-site.
7. Applicant currently uses property across the street for parking, but that lot is in a residential zoning district, and Applicant is required to obtain a special use permit from the Raleigh City Council before the property can be used for parking.
8. Applicants services average between 60 and 70 attendees on Sunday mornings, and 15 on Sunday afternoons. There is also a Wednesday Bible Study that has approximately 35 to 40 attendees.
9. Applicant also has an outreach program on Fridays, during which approximately 30 to 40 people are fed.
10. Strict compliance with the provisions of the ordinance would not deprive Applicant from the reasonable use of the property.
11. Applicant's hardship is not related to the unique circumstances of the property.
12. The Applicant's actions created the hardship or the practical difficulties.
13. The character of surrounding properties would be adversely affected by the granting of the variance.

14. The variance requested is a significant deviation from the ordinance and is inconsistent with its intent and purpose.
15. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.
 - (c) Traffic conditions in the area and accessibility of the building for fire and police protection.

Conclusions of Law

1. Applicant has presented insufficient evidence of practical difficulties or unnecessary hardships to justify a variance of the strict letter of the ordinance.

Motion

Chairman Coble moved to deny the parking reduction request. His motion was seconded by Mr. Jeffreys and received the following vote: Ayes – 5 (Coble, Jeffreys, McLamb, Figgins, Shear); Noes – none. Chairman Coble ruled the motion adopted and the variance request denied.

Chairman Coble advised the applicants the church could secure more binding commitments for parking and come back with a lesser reduction request and they will need a special use permit for the off-site parking.

A-72-13 – 09/09/13

DECISION: Approved the Special Use Permit with the following conditions:

1. No walk-up retail traffic; and
2. No sign.

WHEREAS, Yinhui Liu and Wangxing Wu, property owners, appeal for a Special Use Permit per Code Section 10-2144 to operate a Limited Home Business (an internet store selling accessories for electronics and computers) with no outside employees and no sign in the Thoroughfare zoning district at 8335 Primanti Boulevard.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony.

The property owner is requesting a Special Use Permit to operate a limited home business with no outside employees and no sign in the Thoroughfare zoning district. The business will provide sales of electronics and computers. The code does allow the resale of items, such as, but not limited to, antiques, jewelry and clothing in addition to handmade items

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produced in the home. It does not specifically address mail order or internet sales. However, if there are no employees or sales from the home the only impact would be the shipping and receiving of products to the home. The office is located on the 2nd floor and does not exceed 25% of the livable portion of the home.

Staff position is the conditions of approval can be met.

Chairman Coble requested clarification regarding staff's concern with Mr. Silverstein responding that the Board could resolve the issue of parking if all shipments take place off site and that no customers come to the premises.

Mr. Shear noted there is one employee but he is located off site with Mr. Fulcher adding that would not have an impact on the special use permit.

Applicant

Yinhui Liu, 8335 Primanti Boulevard (sworn) explained the proposed business would be an internet store selling electronic related accessories such as smartphone holders, etc.

In response to questions, Ms. Liu stated all sales would be shipped and that no customers would come to the premises. She stated all shipments would be taken to UPS and Federal Express facilities and deliveries would be made to the premises about once per day. She noted her business partner lives in Mainland China, that only she and her husband would be operating the business at their home.

Opposition

None

Findings of Fact

1. Applicant seeks a special use permit pursuant to Raleigh City Code Section 10-2144 to operate a limited home business.
2. The Board has considered Applicant's verified application and the evidence and the testimony adduced at the hearing.
3. Applicants will operate an internet store selling accessories for electronics and computers. There will be no customers coming to the home.
4. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.

5. Based on the application, including the plot plan, and the testimony at the hearing, Applicant has satisfied the requirements of Raleigh City Code Section 10-2144(b)(limited home business).

Conclusions of Law

1. Applicant has met the requirements of Raleigh City Code Section 10-2144, and the special use permit for the limited home business should be issued.
2. It is necessary and appropriate to impose the following conditions and safeguards on the issuance of the special use permit: There will be no sign in the yard and no walk up retail traffic.
3. The decision is subject to review for fraud, material misrepresentation, or other misconduct at the proceeding or for violations on the subject property of either any provision of Chapter 10 of the Raleigh City Code Section or an imposed limiting condition, and if such a determination is made by the Board, its prior decision may be reversed, modified, or affirmed.
4. If any of the conditions affixed hereto or any part thereof shall be held invalid or void, then the decision shall be void and of no effect.

Motion

Chairman Coble moved to approve the Special Use Permit with the conditions that there be no sign and that there would be no walk up retail traffic. His motion was seconded by Mr. Figgins and received the following vote: Ayes – 5 Coble, Figgins, McLamb, Jeffreys, Shear; Noes – none. Chairman Coble ruled the motion adopted and the Special Use Permit granted with conditions.

A-73-13 – 09/09/13

DECISION: Approved the Special Use Permit as requested

WHEREAS, Michael Nichols, property owner, appeals for a Special Use Permit per Code Section 10-2144 to operate a Limited Home Business (Smash-Mouth, LLC, on-line sales of framed sports memorabilia) with 2 outside employees and no sign in the Residential-6 zoning district at 1855 Wild Dunes Drive.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony:

The property owner is requesting a Special Use Permit to operate a limited home business with 2 outside employees and no sign in the Residential-6 zoning district. This is request is for an online business involved in selling framed sports memorabilia. I would ask the applicant to speak to the 2 outside employees and whether they will be working from this address. The driveway will accommodate 2 parking spaces but would be stacked in front

of the garage. The room shown for the office does not exceed 25% of the livable portion of the home.

Staff's concerns would be the additional parking and traffic created by the 2 outside employees and whether the items are shipped and received from the home.

Applicant

Michael Nichols, 1855 Wild Dunes Drive (sworn) confirmed that his business would consist of on-line sales listing about 10 items on his website at any given time. He stated no customers nor vendors would visit the home and noted he does not have any employees at the current time. He stated he asked for the employees in case his business expands, and that the employees would be contractors that may visit the premises on occasion. In response to questions, Mr. Nichols stated all shipments would be taken off site to the Federal express and UPS facilities. He stated all framing of the merchandise would take place off-site and that the finished product would be stored on-site until it is sold.

Brief discussion took place regarding how the current request would compare to an expansion of a day care facility.

Chairman Coble questioned the type of employees the applicant may require with Mr. Nichols responding he may hire a computer consultant and a person to frame the memorabilia; however, most of that would take place off site.

Opposition

None

Findings of Fact

1. Applicant seeks a special use permit pursuant to Raleigh City Code Section 10-2144 to operate a limited home business.
2. The Board has considered Applicant's verified application and the evidence and the testimony adduced at the hearing.
3. Applicant intends to engage in the on-line sale of framed sports memorabilia.
4. All of Applicant's business will be conducted online, and no customers will come to the premises.
5. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.

6. Based on the application, including the plot plan, and the testimony at the hearing, Applicant has satisfied the requirements of Raleigh City Code Section 10-2144(b)(limited home business).

Conclusions of Law

1. Applicant has met the requirements of Raleigh City Code Section 10-2144, and the special use permit should be issued.
2. The decision is subject to review for fraud, material misrepresentation, or other misconduct at the proceeding or for violations on the subject property of either any provision of Chapter 10 of the Raleigh City Code Section or an imposed limiting condition, and if such a determination is made by the Board, its prior decision may be reversed, modified, or affirmed.

Motion

Chairman Coble moved to approve this special use permit as requested. His motion was seconded by Mr. McLamb and received the following vote: Ayes – 5 (Coble, McLamb, Jeffreys, Figgins, Shear); Noes – none. Chairman Coble ruled the motion adopted and the Special Use Permit granted as requested.

Mr. Williams stepped out of the meeting.

A-74-13 – 09/09/13

DECISION: Approved the Special Use Permit with the following conditions:

1. Hours of operation 7:00 a.m. to 6:00 p.m. Monday through Friday; and
2. No additional exterior lighting.

WHEREAS, Country Day Montessori, LLC, property owner, appeals for a Special Use Permit per Code Section 10-2144 to operate a day care facility for up to 88 children with 13 employees and a sign in the yard in the Residential-10 zoning district at 1201 Kent Road.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony:

The applicant is requesting a Special Use Permit to operate a day care facility for up to 88 children with 13 employees and a sign in the yard in the Residential-10 zoning district. There are 10 conditions under Raleigh City Code Section 10-2144 which must be met:

- 1) The use will not be injurious to property or improvements in the affected area.
- 2) 300 square feet of land area required per enrollee. The land area of the lot will allow up to 117 enrollees.

- 3) 75 square feet of outdoor play area is required with a minimum of with a minimum of 4,950 square feet based on 66 children 18 months or older.
- 4) The structure is similar in appearance to the area.
- 5) Parking is required based on 1 space for every 8 children and 1 space per employee for a total of 24 spaces. 15 are existing and 9 proposed new spaces to meet this condition.
- 6) Access to Kent Road is adequate based on the total number of children.
- 7) There is existing landscaping along the side and rear property lines as well as street yard trees along Kent Road.
- 8) No lighting plan is shown.
- 9) One unlighted 2 square foot, 3.5 foot high announcement sign is allowed.
- 10) No vehicle is being used in connection with the day care.

The existing structure has been used previously as a day care center and more recently as a group home. With the addition of the required parking staff's position is the conditions are being met.

Chairman Coble questioned whether the site was used as a daycare in the past with Mr. Fulcher responding in the affirmative pointing out the previous day care was approved for approximately 60 children.

Applicant

Georgiana Nderitu, 1030 Kennicott Avenue, Cary, NC (sworn) stated she is the Director of the school. In response to questions, she stated the school currently operates out of the facility located off of Blue Ridge Road and proposes to move the school to the present site. She stated the school operates facilities from infants up to pre-kindergarten and her clients come from Wake and Durham counties and that outside vendors will come to the site to conduct programs at the school.

Chairman Coble questioned the hours of operation and Ms. Nderitu stated the older children would be at the facility from 7:00 a.m. to 6:00 p.m. with the younger children at the school from 7:30 a.m. to 5:30 p.m.

The location of the proposed outside play areas was discussed with Ms. Nderitu noting there are no plans for additional exterior lighting.

Opposition

Jerome Goldberg, 8701 O'Neil Road (sworn) stated he owns property located across Kent Road from the subject property. He stated the issue he has is traffic noting his property is located on the corner of Garland and Kent Road.

Mr. Williams returned to the table.

Mr. Goldberg expressed his concern that Kent Road has only one lane of traffic in each direction.

Both Chairman Coble and Mr. Silverstein advised Mr. Goldberg regarding North Carolina State Statutes governing expert testimony on opinions of traffic issues in quasi-judicial proceedings with Mr. Goldberg responding it is difficult for his client to access Kent Road due to the amount of traffic. He stated he has seen traffic backed up from Western Boulevard to the subject property and questioned whether he would have to have a traffic engineer testify regarding traffic.

Mr. Goldberg also questioned whether the Board could condition its approval on the applicant obtaining a traffic impact analysis with Chairman Coble responding no traffic impact analysis is required as staff stated the conditions have been met. Further discussion took place regarding the traffic issues with Chairman Coble reminding Mr. Goldberg that expert testimony would be required from the opposition with regard to traffic issues.

Mr. Goldberg again questioned why traffic impact analysis could not be made a condition of the permit and stated he did not know he needed expert testimony for today's meeting with Chairman Coble stating Mr. Goldberg could express his personal observation or his personal knowledge of the situation.

Mr. Goldberg stated it was his understating that the current permit for the group home was issued in error and stated he knows the property has not been occupied for over a year with Mr. Fulcher pointing out that permit is not germane to this application.

Mr. Goldberg requested that the matter be deferred so that he could retain the services of a traffic engineer to give expert testimony with the regard to the traffic impact. He stated the Board's process should be user friendly. Chairman Coble stated the Board will take that request into consideration.

Rebuttal by Applicant

Ms. Nderitu noted there is a school located at the end of Kent Road so there should not be additional impact to traffic. She stated most students have siblings that attend the school therefore the number of cars accessing the property would not be as large as projected.

Pick up and drop off times for the school was discussed briefly.

Mr. Fulcher pointed out other issues regarding the facility would be addressed during the site plan approval and that staff will look at such issues as vehicular movements in and out of the property, etc.

Findings of Fact

1. Applicant seeks a special use permit pursuant to Raleigh City Code Section 10-2144 to operate a daycare facility.

2. The Board has considered Applicant's verified application and the evidence and the testimony adduced at the hearing.
3. The facility will have up to 88 children with 13 employees.
4. The land area is adequate to meet the code requirement of 300 sq. ft. of land area per enrollee, and up to 117 enrollees would be allowed.
5. The site has 75 sq. ft. of outdoor play area per enrollee based on 66 children 18 months or older.
6. The structure's appearance is consistent with other structures in the area.
7. The code requires 24 parking spaces to be installed, and the site is sufficient to provide 24 spaces.
8. The access from the daycare facility to Kent Road is adequate based on the number of children to be enrolled.
9. The existing landscaping along the side and rear property lines, and the street yard trees along Kent Road meet Code requirements.
10. There will be no additional exterior lighting.
11. The sign to be installed meets the code requirements.
12. No vehicles are being used in connection with the daycare facility.
13. The existing structure has previously been used as a daycare center, and more recently as a group home.
14. The previous daycare facility accommodated approximately 60 children.
15. The hours of operation will be from 7:00 A.M. to 6:00 P.M., Monday through Friday.
16. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.
 - (c) Traffic conditions in the area and accessibility of the building for fire and police protection.
 - (d) The type of electric illumination for the proposed use, with special reference to its effect on nearby structures and the glare, if any, from such illumination in surrounding sleeping quarters.
17. Based on the application, including the plot plan, and the testimony at the hearing, Applicant has satisfied the requirements of Raleigh City Code Section 10-2144(b)(daycare facility).

Conclusions of Law

1. Applicant has met the requirements of Raleigh City Code Section 10-2144, and the special use permit for the daycare facility should be issued.
2. It is necessary and appropriate to impose the following conditions and safeguards on the issuance of the special use permit: (1) Hours of operation are 7:00 A.M. to 6:00 P.M., Monday through Friday and (2) There will be no additional exterior lighting.
3. The decision is subject to review for fraud, material misrepresentation, or other misconduct at the proceeding or for violations on the subject property of either any

provision of Chapter 10 of the Raleigh City Code Section or an imposed limiting condition, and if such a determination is made by the Board, its prior decision may be reversed, modified, or affirmed.

4. If any of the conditions affixed hereto or any part thereof shall be held invalid or void, then the decision shall be void and of no effect.

Motion

Chairman Coble moved to deny opposition's request to defer the matter and grant the Special Use Permit with the following conditions: 1) hours of operation 7:00 a.m. to 6:00 p.m. Monday through Friday; and 2) no additional exterior lighting. His motion was seconded by Mr. McLamb and received the following vote: Ayes – 5 (Coble, McLamb, Jeffreys, Figgins, Shear); noes – none. Chairman Coble ruled the motion adopted; therefore the opposition's request to defer is denied and the Special Use Permit is granted with conditions.

A-75-13 – 09/09/13

DECISION: Approved variance as requested

WHEREAS, Centerpivot, LLC, property owner, and Oak City Partners, LLC, contract to purchase, appeal for a 10 foot variance in the street side yard setback requirements per Code Section 10-2075 to build a single family dwelling in the Residential-20 zoning district at 513 Rosengarten Alley.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony:

The applicant is requesting a 10 foot variance in the 20 foot corner lot side yard setback to build a detached single family dwelling on an existing nonconforming lot in the Residential-20 zoning district. This property came before the board in August of 2012 for a 10 foot front yard variance and a 100% corner lot side yard variance. The current drawing shows a structure meeting the 20 foot front and rear setbacks and 5 feet on the opposing side yard within the required setbacks. The structure also jogs in on the corner lot side to reduce the corner lot variance to 10 feet. Based on these revisions staff is not opposed to this request.

Chairman Coble questioned whether the front of the dwelling would be oriented towards Rosengarten Alley with Mr. Fulcher responding in the affirmative.

Discussion took place regarding the previous request for this property involving a 100% reduction and how it was denied by the Board over concerns with fire and rescue accessing the property with Mr. Fulcher pointing out he had not heard those concerns expressed when reviewing this application.

Applicant

Attorney Ben Kuhn, 127 West Hargett Street (sworn) referred to a PowerPoint presentation in presenting testimony. He referred to illustrations showing previous plans and the current request stating his client took efforts to alleviate concerns regarding fire and rescue access to the property. He stated the subject lot is the last property on Rosengarten Alley to be developed and went on to talk about how difficult it would be to build on the lot without a variance and also talked about his client's efforts to improve the neighborhood.

Discussion took place regarding a variance request for the property located to the rear of the subject property that fronts on South Saunders Street.

Chairman Coble stated the Board may impose a condition that there be no fencing along the south side of the property along the alley.

Johnny Chappell, 512 South Saunders Street (sworn) stated the only issue he has with the fence condition is that the property behind it, 514 South Saunders Street has a fence and it is closer to the alley. He stated most of the lots in the area have fences because the owners have pets.

Attorney Kuhn referred to a map included in the application packet stating the fence condition may affect the property owner's ability to fence in the back yard for a pet and asserted such a condition may not be necessary.

Mr. Silverstein noted the previous case involved using the existing foundation with Attorney Kuhn responding by talking about proposed changes to the foundation to meet the proposed setbacks. Mr. Kuhn also presented pictures of other developed properties in the area.

Mr. Chappell stated he had observed no issues regarding access to Rosengarten Alley. Chairman Coble questioned where trash is collected from Rosengarten Alley with Mr. Chappell responding trash bins and containers are placed at the Alley's Cabarrus Street entrance.

Mr. Shear stated in the previous case regarding this property he wanted an explicit statement from the Fire Department that access was okay. He noted there was no such statement for this case and expressed his desire to get that statement from the Fire department.

Attorney Kuhn referred to a portion of a PowerPoint presentation that addressed the public safety concerns which reads as follows:

The granting of the variance secures the public safety and welfare and does substantial justice.

- Increases area for fire, police, and other neighborhood residents' vehicles over what currently exists, thus securing the public safety and welfare;
- Removes a potential nuisance condition as shown by evidence of vagrants using the foundation for shelter, again securing the public safety and welfare;

- Not granting the variance would deny the Applicant/owner, and neighboring property owners substantial justice by not permitting the reasonable and beneficial development of the site in a manner consistent with the on-going redevelopment efforts in this area of downtown Raleigh; and
- Owner still has to secure all required building and development related permits for safe and secure construction and occupancy of a new single-family home that will become a contributing part of the downtown residential home stock for the next 100+ years.

The size of the proposed dwelling was discussed with Attorney Kuhn submitting notarized statements in support of the request from us following property owners:

Jason Brown, Starcraft Builder's, Inc., property owner, 511 Rosengarten Alley
Heather Anderson, contract purchaser, 511 Rosengarten Alley
Clifford Webster, Owner, 514 S. Saunders Street

Opposition

None

Findings of Fact

1. Applicant seeks a variance from Raleigh City Code Section 10-2075 to erect a dwelling.
2. The Board has considered Applicant's verified application and the evidence and testimony adduced at the hearing.
3. In order to comply with Raleigh City Code Section 10-2075, Applicant would have to maintain a 20' street side yard setback.
4. Applicant is unable to comply with Raleigh City Code Section 10-2075 because Applicant could not erect a dwelling on this lot and meet the setback requirements.
5. This property was before the Board in August, 2012, at which time a 10' front yard variance and 20' corner lot side yard variance had been requested.
6. The current application differs from the previous application in that the front and rear setbacks are met, and the street side yard setback has been reduced by 10'.
7. In the previous case, there was testimony from the Raleigh City Fire Department that its trucks would not be able to access this property in case of an emergency.
8. There was no evidence that the current proposal would provide any impediments to public safety.
9. This vacant lot has attracted vagrants and debris, and erecting a dwelling would constitute an improvement to the neighborhood.
10. Strict compliance with the provisions of the ordinance would deprive Applicant from the reasonable use of the property.
11. The Applicant's actions did not create the hardship or the practical difficulties.
12. The character of surrounding properties would not be adversely affected by the granting of the variance.

13. Denial of the variance would result in insignificant public benefit but would greatly harm Applicant.
14. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.
 - (c) Traffic conditions in the area and accessibility of the building for fire and police protection.

Conclusions of Law

1. There are practical difficulties or unnecessary hardships in complying with the strict letter of the ordinance.
2. The variance is in accordance with the general purpose and intent of the ordinance and preserves its spirit.
3. The granting of the variance secures the public safety and welfare and does substantial justice.
4. This decision is subject to review for fraud, material misrepresentation, or other misconduct at the proceeding or for violations on the subject property of either any provision of Chapter 10 of the Raleigh City Code or an imposed limiting condition, and if such a determination is made by the Board, its prior decision may be reversed, modified, or affirmed.

Motion

Chairman Coble moved to approve the variance as requested. His motion was seconded by Mr. Shear and received the following vote: Ayes – 5 (Coble, Shear, McLamb, Jeffreys, Figgins); Noes – none. Chairman Coble ruled the motion adopted and the variance is granted.

A-77-13 – 09/09/13

DECISION: Approved the variance as requested.

WHEREAS, WPG Properties, LLC; Worth P. Gurley, property owner, appeals for a 3 foot variance from the minimum 40 foot lot width in the South Park Neighborhood Conservation Overlay District per Code Section 10-2054 to subdivide 1 lot with 2 residences into 2 lots of 37 feet width each with 1 residence on each lot in the Residential-20 zoning district at 513 and 515 Worth Street.

Zoning Enforcement Administrator Walt Fulcher (sworn) presented the following testimony:

The property owner is requesting a 3 foot variance in the 40 foot lot width to subdivide the existing lot in the Residential-20 zoning district with Neighborhood Conservation Overlay. The South Park overlay allows min lot sizes of 3,000 square feet with lot widths of 40 feet. In this case the lot size and lot width requirements are part of Raleigh City Code Section 10-2054 Neighborhood conversation overlay. This would be improving the existing conditions by subdividing the lot and each structure being located on its own lot. Staff is not opposed to this request.

Applicant

Worth Poole Gurley, 403 West Aycock Street (sworn) stated his family has owned the subject property since 1938 and since the recent death of his father, the family has decided to liquidate the family holdings. He stated the county lists two tax bills; however it is in reality one lot.

Chairman Coble talked about similarities between this case and a recent case before the Board regarding property on New Bern Avenue. He questioned whether has always been two houses on the subject lot with Mr. Gurley responding in the affirmative.

Opposition

None

Findings of Fact

1. Applicant seeks a variance from Raleigh City Code Section 10-2054 to subdivide a lot.
2. The Board has considered Applicant's verified application and the evidence and testimony adduced at the hearing.
3. In order to comply with Raleigh City Code Section 10-2054, Applicant would have to provide lots with a minimum of 40' width.
4. The proposed lots would be 37' wide each.
5. There are presently 2 homes on the same lot, which is not permitted in the Raleigh City Code.
6. By subdividing the lot, Applicant would reduce the nonconformity by creating 2 lots, each of which would have one structure.
7. The lot is in the Residential-20 Zoning District with neighborhood conservation overlay, which requires minimum lot widths of 40'.
8. Strict compliance with the provisions of the ordinance would deprive Applicant from the reasonable use of the property.
9. Applicant's hardship is related to the unique circumstances of the property, namely its nonconforming status.
10. The Applicant's actions did not create the hardship or the practical difficulties.
11. The character of surrounding properties would not be adversely affected by the granting of the variance.
12. Denial of the variance would result in insignificant public benefit but would greatly harm Applicant.

13. Pursuant to Raleigh City Code Section 10-2141(b), the Board has considered the following relevant factors:
 - (a) The character and use of buildings and structures adjoining or in the vicinity of the property mentioned in the application.
 - (b) The number of persons residing, studying, working in or otherwise occupying buildings adjoining or in the vicinity of the property mentioned in the application.

Conclusions of Law

1. There are practical difficulties or unnecessary hardships in complying with the strict letter of the ordinance.
2. The variance is in accordance with the general purpose and intent of the ordinance and preserves its spirit.
3. The granting of the variance secures the public safety and welfare and does substantial justice.
4. This decision is subject to review for fraud, material misrepresentation, or other misconduct at the proceeding or for violations on the subject property of either any provision of Chapter 10 of the Raleigh City Code or an imposed limiting condition, and if such a determination is made by the Board, its prior decision may be reversed, modified, or affirmed.

Motion

Chairman Coble moved to approve the variance as requested. His motion was seconded by Mr. Figgins and received the following vote: Ayes – 5 (Coble, Figgins, McLamb, Jeffreys, Shear); Noes – none. Chairman Coble ruled the motion adopted and the variance granted.

MINUTES – AUGUST 12, 2013 BOARD OF ADJUSTMENT MEETING – APPROVED AS WRITTEN

Chairman Coble noted members of the Board received copies of the Minutes from the Board's August 12, 2013 meeting. Without objection, Chairman Coble moved to approve the Minutes as written. His motion was seconded by Mr. Jeffreys and a roll call vote resulted in all members voting in the affirmative. Chairman Coble ruled the motion adopted.

REPORT OF THE BOARD'S ATTORNEY

Chairman Coble noted Mr. Silverstein had sent a memo to Board members talking about the City's Unified Development Ordinance (UDO) and changes to the Board's responsibilities, the body of which reads as follows:

Important substantive and procedural changes in the way the Raleigh Board of Adjustment operates are upon us. On September 1, 2013, Raleigh's UDO took effect, followed one month later by amendments to N.C.G.S. §160A-388. The purpose of this memorandum is to highlight those changes.

I. N.C.G.S. § 160A-388.

(a) Composition and Duties. The only real change in this section is to authorize the creation of specialized boards to hear technical appeals. This was probably added for appeals relating to issues such as storm water for which the Board may lack expertise.

(a1) Provisions of Ordinances. Although this is a new section, it simply codifies the Board's authority to consider special and conditional use permits, variances, and appeals from administrative decisions. It broadens the Board's authority in the last sentence by authorizing it to hear and decide all matters assigned to it under a land use or development ordinance. This new section extends the Board's authority beyond zoning matters.

(a2) Notice of Hearing. This is also a new section that specifies to whom notice of the hearing must be sent.

(b1) Appeals. Paragraph (b) of N.C.G.S. § 160A-388 was deleted, and a new paragraph was adopted. This section now makes it clear that only a person who has standing under N.C.G.S. § 160A-393(d) can appeal a decision to the Board of Adjustment. The appeal must be filed within thirty (30) days of receipt of written notice for the owner or a party, and from receipt "from any source of actual or constructive notice" for any other person with standing. Constructive notice is delivered when a sign containing the words "Zoning Decision" or "Subdivision Decision" in letters at least six inches (6") high is prominently posted on the property, and remains there for at least ten (10) days. The statute also makes posting the responsibility of the landowner or applicant but provides that posting the signs is not the only form of constructive notice. Verification of the posting must be made to the administrative official. The same official is also responsible for transmitting the record to the Board, as well as a copy to the property owner. As before, an appeal stays enforcement, but there is a procedure for lifting the stay if it would cause imminent peril to life or property. The official who made the decision is required to be present at the hearing. A scope of review is established for the Board, which is the same as enunciated in N.C.G.S. § 160A-393(k), which applies to appeals to Superior Court. When interpreting an ordinance, the Board reviews that issue "De Novo" which clarifies that the Board is not bound by the administrative official's interpretation. A further note is the discussion of the term "competent evidence" including evidence not admissible under the rules of evidence if there is no objection and it appears sufficiently trustworthy and reasonable for the Board to reply on it. "Competent evidence" specifically excludes lay witness testimony as to the use of property in a particular way affecting the value of other property, the increase in vehicular traffic resulting from a proposed development posing a danger to public safety

or matters about which only expert testimony would generally be admissible under the rules of evidence. Finally, the parties to an appeal may agree to mediation or other forms of alternative dispute resolution, which can be limited by standards and procedures established in the ordinance.

(c) Special and Conditional Use Permits. No essential changes.

(d) Variances. The statutory authority for granting variances has changed. The phrase “practical difficulties” has been removed from the statute. The language now says that a variance shall be granted upon a showing of: (i) unnecessary hardship (without the necessity of showing that no reasonable use can be made of the property), (ii) the hardship results from conditions peculiar to the property, (i.e., location, size, or topography, but does not include personal circumstances or those that are common to the neighborhood or the general public), (iii) the hardship did not result from actions taken by the applicant or property owner; however, purchasing the property with knowledge that circumstances exist that may justify the granting of a variance does not constitute a self-created hardship, and (iv) the variance is consistent with the spirit, purpose and intent of the ordinance. In another expansion beyond what had traditionally been the Board’s role, any other ordinance regulating land use or development may provide for variances to be issued by the Board.

(e) Voting. In a significant change, every matter upon which the Board votes will now be determined by a majority vote, except for a variance, which still requires a 4/5’s majority.

(e1) This section deals with conflicts created that prohibit Board Members from participating, and the manner in which a Board Member should be recused.

(e2) Quasi Judicial Decisions and Judicial Review. The standard of proof is competent, material and substantial evidence in the record. This section deal with procedural matters relating to the manner in which the decision is filed with the clerk and disseminated to interested parties.

(f) Oaths. A provision was added making it a misdemeanor to swear falsely in a proceeding before the Board.

(g) Subpoenas. A procedure for requesting the issuance of subpoenas from the chair was added.

II. UDO.

Although the effective date for the UDO is September 1, several inconsistencies with N.C.G.S. § 160A-388 that will go into effect on October 1 still remain, so technical corrections to the UDO still need to be made. Further, while the UDO should apply immediately to districts that are zoned residential, changes in the office and commercial

zoning districts under the UDO will require that properties currently in those zoning classifications will have to go through rezoning hearings before the UDO will apply; therefore, the Board will still be applying the “old” code to some properties, and the transition could take as long as several years to conclude.

A. PROCESS

Section 10.1.8 of the UDO is a table that summarizes the review and approval authority of the various review bodies. The approval process for the following categories is delegated to the Board: Plot Plan Review, Site Plan Review, Special Use Permit, Variance, Common Signage Plan, Temporary Use Permit, Written Interpretation of UDO, Certificate of Appropriateness (Major), and Administrative Alternatives.

In a procedural change, the initial applications will be submitted through the Planning and Development Department rather than through the City Clerk’s Office.

Section 10.2.1.D.1 lists the quasi-judicial public hearing requirements. To a large extent, the general statutes are tracked, such that impermissible conflicts for Board Members include having a fixed opinion prior to the hearing that is not susceptible to change, undisclosed ex-parte communication, a close financial business or other association relationship with an affected person or a financial interest in the outcome of the matter.

With regard to procedural requirements, “parties in interest” have the right to present evidence and cross examine witnesses. That phrase is not defined, but it does seem to give the Board Chair the authority to limit extraneous comments by persons who would not have standing in the case. The presiding officer is given the discretion to reopen proceedings for additional testimony or argument when a decision cannot be made with the testimony at hand. The UDO also makes it clear that members of the Board can ask questions of anyone presenting testimony until the deliberations start. Requests for continuances and deferrals are considered by the reviewing body.

B. SPECIAL USE PERMITS

Every special use permit must meet the following requirements:

1. The proposed use complies with all applicable provisions of this UDO unless otherwise expressly modified in accordance with this UDO.
2. The proposed use is allowed as a special use in the respective zoning district (Chapter 6).

3. The proposed use complies with any specific use standard listed in Chapter 6 without the granting of any variance to the specific uses standard.
4. The proposed use is compatible with adjacent uses in terms of location, scale, site design, hours of operation, and operating characteristics.
5. Any adverse impacts resulting from the proposed use in the affected area will be effectively mitigated or offset or the special use is denied.
6. Access with respect to pedestrian, bicycle and automotive safety, traffic flow and emergency service is adequate.
7. Signage is suitable and appropriate.
8. Any appropriate dedications of streets and utilities to the public will be made prior to the issuance of a building permit.

Previously the Board rules determined when a special use permit would expire, but the UDO now states that it expires after one year from the date of approval unless a completed building permit application is submitted or a zoning permit if no building permit is required. The payment of all fees must have been paid by the applicant and accepted by the City.

Section 6.1.4 is a table listing the use categories for which special permits are required. They include: group living (with listed exceptions), congregate care, life care community, rest home, special care facility, major utilities (particularly telecommunication towers in excess of 250 feet), day care center, adult establishment, outdoor sports or entertainment facility containing more than 250 seats, overnight lodging except bed and breakfast and hospitality house, remote parking lot, air field, landing strip, heliports not serving hospitals, animal care (outdoor), detention center, jail, prison, towing yard for vehicles, community garden, plant nursery, urban farm and resource extraction. The table also indicates in which zoning districts each of these uses would be permitted.

C. VARIANCES

The UDO also contains standards for the issuance of variances, but this is an area in which there are inconsistencies with the recent changes in N.C.G.S. § 160A-388, so the variance section will have to be corrected to comply with the State Statute. Currently, the UDO states that the following conditions must be satisfied before a variance can issue:

- a. The variance will not authorize a use other than those uses allowed in the applicable district.
- b. The variance is in accordance with the stated purposes and intent of this UDO.
- c. That literal enforcement of the provisions of Chapters 1 through 5 and Chapter 7 will result in practical difficulties or unnecessary hardship.

- d. The practical difficulties or unnecessary hardship are not created by the owner of the property or the applicant and are not due to or the result of general conditions in the district in which the property is located.
- e. The practical difficulties or unnecessary hardship are not solely financial.
- f. The variance will not substantially or permanently injure the allowed uses of adjacent properties.
- g. The variance requested is the minimum necessary variance to legalize the use of the land, building, parking facility, or structure.
- h. The variance will not adversely affect the public health, safety, or welfare.

Interestingly, while a special use permit expires one year from the date of approval if a particular action has not been taken, the expiration for a variance in the UDO is six months.

D. ADMINISTRATIVE DECISIONS

Appeals from administrative decisions can be made by any "aggrieved person" or the City related to Chapters 1 through 7 and Chapter 11. The City Council hears appeals related to preliminary subdivision plans or combination or recombination of lots, the City Manager hears appeals on final subdivision plats or design adjustments, and all other appeals of administrative decisions, including site plan decisions not related to Chapters 8, 9, and 11, go to the Board.

III. Rules of Procedure.

There are many instances in the rules where the references to the Raleigh City Code will need to be changed to the UDO. While the rules have been modified over the years to address specific situations from time to time, they have not been thoroughly reviewed and revised in a long time. Some of the procedures listed in the rules have been incorporated into the UDO, while others are either no longer relevant or need to be updated. It would be my recommendation that the Chair appoint a committee to work with the Board's Counsel in developing a new set of rules of procedure for the Board.

Mr. Silverstein noted the non-residential districts will not be affected until they are rezoned; therefore the existing code is in effect until the property is rezoned. Mr. Silverstein noted the Board may see an increase in cases and may see different kinds of cases in the future. Chairman Coble added there may be some parallel issues for the Board to deal with for a period of time.

Mr. Silverstein noted there are some changes to the new UDO that need to be made due to recent state legislation. He noted all Board of Adjustment applications submitted after September 1 are handled through the City's Planning and Development Department.

Whether the Board members would be furnished with a copy of the new UDO was discussed briefly.

Chairman Coble questioned whether applicants would be required to furnish copies of the actual section of the UDO they are appealing, with Mr. Fulcher responding staff is working on revising the application and pointed out that requirement may be included.

Chairman Coble stated he would like to get a small group together to work on revising the Board's rules of procedure.

Mr. Shear noted the new UDO is full of pictures and questioned whether the Board should make its decision based on those pictures.

Chairman Coble requested volunteers to get together to work on revising the Board's rules of procedure with Mr. Silverstein and Ms. Kemerait both volunteering to help work on revising the rules of procedure.

Chairman Coble questioned whether the case the record was filed regarding the Harden Road Montessori School with Mr. Silverstein responding that Assistant Deputy Clerk Puccini filed the case file on August 30 and noted the City Attorney's office chose not to participate in the matter because the opposing attorneys can represent the parties well in court.

In response to questions regarding the Greene gunsmith case, Assistant Deputy Clerk Puccini stated the case record will be filed with the Clerk of Court within the next two days.

ADJOURNMENT

There being no further business, Chairman Coble announced the meeting adjourned at 3:15 p.m.

Ralph L. Puccini
Assistant Deputy Clerk
Clerk to the Board of Adjustment

jt/BOA09-09-13

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